NO. 84828-9

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY,
husband and wife,

Respondents,

vs.

KENNETH W. GRAVES and KAREN R. GRAVES,
Trustees of the Graves Family Trust; and all other persons
or parties unknown claiming any right, title, estate, lien,
or interest in the real estate described in the complaint herein,

Appellants.

BRIEF OF APPELLANTS

Philip A. Talmadge, WSBA #6973
Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Frederick Mendoza, WSBA #6021
Maya R. Mendoza-Exstrom, WSBA #39333
Mendoza Law Center, PLLC
P.O. Box 66890
Burien, WA 98166-0890
(206) 244-1641
Attorneys for Appellants Graves

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Statutes

Other Authorities

A. INTRODUCTION

William Kiely and Sally Chapin-Kiely (collectively "the Kielys") brought this quiet title/adverse possession action to quiet title in themselves in an alley dedicated for public use and situated wholly within the Power Addition to the City of Port Townsend ("the City").[1] The alley forms the boundary line between the Kielys' property in the neighboring Winslow's Addition to the City and the property of appellants Ken and Karen Graves (collectively "the Graves") in the Power Addition. What makes this case complex is that by the time the Kielys filed their lawsuit, the City had formally vacated the alley and conveyed it to the Graves via a recorded lot line adjustment. By necessity, the case requires a determination of the quantum of title held by the City, the original dedicators' successors-in-interest. But the trial court here failed to make that determination when quieting title to the entire alley in the Kielys. Instead, it erroneously assumed the City held only an easement in the alley.

[1] A dedication originates in the voluntary donation of an owner, and, when the intention of that owner to dedicate is clear, manifest, and unequivocal, whether by a written instrument or by some act or declaration, manifesting the clear intent to devote the property to public use, it becomes effective for that purpose. *Corning v. Aldo*, 185 Wash. 570, 576, 55 P.2d 1093 (1936); *Shell v. Poulson,* 23 Wash. 535, 537, 63 P. 204 (1900).

Other issues arise as well, including whether the Kielys established the necessary elements for adverse possession and the scope of the alley actually subject to adverse possession.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error[2]

1. The trial court erred in making finding of fact number 3.

2. The trial court erred in making finding of fact number 4.

3. The trial court erred in entering conclusion of law number 3.

4. The trial court erred in entering conclusion of law number 4.

5. The trial court erred in entering conclusion of law number 5.

6. The trial court erred in entering conclusion of law number 6.

7. The trial court erred in entering conclusion of law number 7.

8. The trial court erred in entering conclusion of law number 8.

---

[2] The trial court's findings of fact and conclusions of law and its judgment and decree are in the Appendix.

9. The trial court erred in entering conclusion of law number 9.

10. The trial court erred in entering conclusion of law number 10.

11. The trial court erred in entering conclusion of law number 11.

12. The trial court erred in entering the Judgment and Decree on July 2, 2010.

(2) Issues Pertaining to Assignments of Error

1. Should a claim for adverse possession with respect to a platted alley dedicated forever to public use be barred by RCW 7.28.090[3] where a municipality held fee simple title to the alley until the alley was formally vacated in February 2009? (Assignments of Error Numbers 2, 3, 4, 5, 6, 11, 12)

2. If a city did not hold fee simple title to an alley dedicated forever to public use, did the party claiming to adversely possess the alley establish the necessary elements of adverse possession against the city's easement interest? (Assignments of Error Numbers 1, 2, 6, 7, 8, 9, 10, 11, 12)

[3] A copy of RCW 7.28.090 is in the Appendix.

3. If a city did not hold fee simple title in an alley dedicated to public use, did the party claiming to adversely possess the alley establish the necessary elements of adverse possession against the servient estate's owners? (Assignments of Error Numbers 1, 2, 6, 7, 8, 9, 10, 11, 12)

C. STATEMENT OF THE CASE

In 1908, John and Mary Power (collectively "the Powers") recorded a plat creating the Power Addition to the City. CP 29; Ex. 27; *see* Appendix. The Power Addition Plat contains the following dedication language:

> And we do hereby dedicate to the public for its use forever as public thoroughfares the streets and alleys as shown on this plat.

Id.; RP II:43.[4] The plat describes an alley 15 feet wide running east to west along the northern border of the Power Addition between Polk Street and Fillmore Street. CP 29; Exs. 27, 28. The alley is located entirely within the Power Addition, and is indicated by lines designating it separately from the lots in the plat.[5] Ex. 1, Ex. 27.

---

[4] "RP II" refers to the April 6, 2010 verbatim report of proceedings. "RP I" will refer to the April 5, 2010 verbatim report of proceedings. The number after the volume designation refers to the specific page where the testimony appears.

[5] The eastern half of the alley (more or less) has been open and used as a public right-of-way, presumably since the plat was recorded. CP 133, 180. A portion of the western half of the alley (more or less) has never been opened, even though it is not physically closed off. CP 29. The remaining western portion of the alley has been open to the public and used for parking. CP 133, 181, 202.

The Graves own a historic home in Port Townsend purchased from the estate of Ken Graves' parents. CP 50, 52, 91; RP I:173-74. Ken grew up in the home, but moved away to attend college. CP 51; RP I:171. He regularly visited his parent's home after he moved away. RP I:171-72. The Graves also own Lot 10 in the Power Addition, which was likewise purchased from the estate of Ken's parents. RP I:175-76, 179. Lot 10 abuts the Graves' historic home on one side and the western border of the alley on the other. CP 133; RP I:175-76.

A few years after the Graves purchased their properties, they began to clear Lot 10 and resurrected a path down to a smokehouse on the lot to make the smokehouse operational. CP 53; RP I:187-88, 212-13, 225. The alley was historically used by Ken and others to access the smokehouse. CP 52. The Graves planted fruit trees, berry vines, and garlic on Lot 10 to maintain it as an open space. CP 50, 53; RP I:191, 224. They eventually hired a landscaper to continue clearing Lot 10. CP 53; RP II:16, 18.

In 2008, the Graves filed a petition with the City to vacate the western half of the alley and merge it into their adjoining lands (i.e., Lot 10). CP 50; Ex. 28. The City held a public hearing on the application, which it processed according to the statutes and ordinances applicable to vacation. CP 29; Ex. 28. As a condition precedent to vacating the alley, the City required the Graves to pay for an appraisal of the alley, a survey

of the alley,[6] and a lot line adjustment. Ex. 28; CP 51, 66-69; RP I:179. It also required them to pay the appraised value of the alley, which was $10,000. CP 51; Ex. 28. The Graves satisfied all of the City's financial conditions. CP 51.

The City also required the Graves to sign an indemnity and hold harmless agreement releasing the City from any future damage claims resulting from the encroachments and/or any adverse possession claim. CP 51; Ex. 28. They did so. *Id.* At no time did the City or the Graves believe there was an adverse possession claim that extended beyond the encroachments identified in the survey. *See* RP I:195. The Graves did not have a lawyer.

In February 2009, the Port Townsend City Council passed Ordinance 3005 to vacate the alley. Ex. 28. The City then conveyed the vacated alley to the Graves via the lot line adjustment recorded on March 2, 2009. CP 51; Ex. 29.

The Kielys own a portion of Blocks 7 and 11 and all of block 9 in the Winslow's Addition, which is located north of the Power Addition.[7] CP 2, 30. No part of the alley dedicated in the Powers Addition belongs in

---

[6] The survey disclosed that a cottage encroaches approximately 15 inches into the alley at its deepest point and a shed encroaches approximately 8.4 inches into the alley at its deepest point. CP 30; Exs. 22, 24.

[7] Block 9 abuts the northern border of the alley. CP 30.

the Winslow's Addition. CP 30. The Kielys' own the cottage and the shed that encroach into the alley. CP 19, 30.

Shortly after the Graves became the record title holders of the alley, the Kielys filed an action in the Jefferson County Superior Court alleging ownership of the entire alley through adverse possession. CP 1-3; Ex. 2. Ten days before trial, visiting judge George Wood denied both parties' motions for summary judgment, including the Graves' motion based on the applicability of RCW 7.28.090. CP 108-11. After a bench trial, Judge Craddock Verser entered a memorandum opinion quieting title to the entire ally in the Kielys. CP 147-52. The trial court entered contested findings of fact and conclusions of law and a judgment and decree in favor of the Kielys as to the entirety of the alley on July 10, 2010. CP 156-60, 162-71. The Graves' direct appeal to this Court followed. CP 172-73.

D. SUMMARY OF ARGUMENT

The burden of proving each element of adverse possession lies with the claimant. The presumption is in the holder of the legal title. Here, the Kielys had to prove that they possessed the alley and that their possession, and that of their predecessors, was open and notorious, actual and uninterrupted for ten years, exclusive, and hostile. They cannot satisfy that burden.

The issues surrounding the Kielys' possession of the alley are complicated by the fact that the alley had been dedicated to the City for public use in 1908 and that the City later vacated the alley and conveyed it to the Graves. Based on statute, Washington courts have long held that when a municipality owns, uses, or holds real property for governmental purposes, the property is immune from adverse possession.

The trial court misapplied Division II's decision in *Erickson Bushling, Inc. v. Manke Lumber Co.*, 77 Wn. App. 495, 891 P.2d 750 (1995). There, the trial court determined the dedicated interest was an easement. But the trial court here failed to determine the nature of the original dedication to the City. It simply assumed the dedicated interest was an easement. The dedication here conveyed fee simple title to the City because it dedicated the alley for the public's use forever.

The trial court erred in concluding the Kielys adversely possessed the entire alley. Even if the City only possessed an alley easement, adverse possession was legally precluded as to that interest because the statute of limitations did not begin to run until the City vacated the alley. The Graves held only a reversionary interest in the alley where the City held only an easement. Had the City not vacated the alley, the Graves would have no interest to dispossess.

The trial court also erred in concluding the Kielys established the necessary elements of adverse possession as to the entire alley. Their use was merely incidental to their proximity to the alley. It was not open and notorious, exclusive, continuous, or hostile.

E. ARGUMENT

(1) Standards of Review

Different standards of review apply in this case. For example, Judge Woods largely resolved the legal issues in this case in his memorandum opinion denying the parties' competing summary judgment motions. CP 108-11. This Court reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). Here, the Kielys bore the burden of demonstrating there was no genuine issue of material fact and that they were entitled to judgment as a matter of law. *See Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

This Court reviews finding of fact to determine if they are supported by substantial evidence. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 113, 937 P.2d 154 (1997); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence is evidence that would persuade a reasonable fact finder of the truth of the declared premise. *See, e.g., Wenatchee Sportsmen Ass'n v.*

Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). But the Court reviews questions of law and conclusions of law *de novo*. *See Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Where a party bears the burden of proof on an issue, and the trial court does not enter a finding on that point, this Court has held that the party has not sustained its burden of proof on the point at issue.

(2) General Principles of Adverse Possession

Adverse possession is a mixed question of law and fact: whether the necessary facts exist is for the trier of fact, but whether those facts constitute adverse possession is an issue of law for the Court to decide. *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984). The burden of proving the existence of each element of adverse possession is on the claimant. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757-58, 774 P.2d 6 (1989); *Woehler v. George*, 65 Wn.2d 519, 524, 398 P.2d 167 (1965). "The presumption is in the holder of the legal title . . . he need not maintain a constant patrol to protect his ownership." *Hunt v. Matthews*, 8 Wn. App. 233, 238, 505 P.2d 819 (1973), *overruled on other grounds in Chaplin*, 100 Wn.2d at 862 (noting the traditional presumptions still apply).

To establish a claim for adverse possession, the Kielys thus had to prove that they and their predecessors-in-interest possessed the alley and

that their possession was (1) open and notorious; (2) actual and uninterrupted for ten years; (3) exclusive; and (4) hostile. *See Chaplan*, 100 Wn.2d at 857. Greater use of a vacant lot is required for notice to an absentee owner. *Hunt*, 8 Wn. App. at 237. The Kielys conceded that to meet their burden, they had to tack their predecessors' adverse use onto their time of possession to establish the necessary time under RCW 4.16.020.

This case is complicated by the fact that government ownership is involved. RCW 7.28.090 states that adverse possession is not possible with respect to lands or tenements owned by the United States or the state and its subdivisions, nor to school lands or lands held for any public purpose. Streets and alleys qualify as a public purpose subject to that statute. "There can be no rightful permanent private possession of a public street." *Town of West Seattle v. West Seattle Land & Improvement Co.*, 38 Wash. 359, 364, 80 P. 549 (1905) (quoting *Elliot on Roads & Streets* (2d Ed.)). Moreover, a property does not lose its character as a public property merely because no public funds are expended for the maintenance or upkeep of the public facility. *Goedecke v. Viking Inv. Corp.*, 70 Wn.2d 504, 509, 424 P.2d 307 (1964). It is well-established that a party may not claim adverse possession against a municipality with

respect to property held by such municipality for public use. *Gustaveson v. Dwyer*, 83 Wash. 303, 304-06, 145 P. 458 (1915).[8]

There is little question that after *Goedecke*, the Kielys, as abutting property owners, could not acquire by adverse possession any part of the alley right-of-way to which the City had title. 70 Wn.2d at 509. This has significance with respect to the scope of any interest the Kielys acquired by adverse possession, as will be discussed *infra*.

(3) The Trial Court Erred in Holding that the City's Interest Conveyed to the Graves Was Subject to Adverse Possession

The trial court misapplied Division II's decision in *Erickson Bushling, Inc. v. Manke Lumber Co.*, 77 Wn. App. 495, 891 P.2d 750 (1995). In that case, the original plat dedicated *only an easement* for a county road. Although the county never opened the road, it likewise never vacated the easement. The plaintiff did not seek to extinguish the easement, restrict public access to it, or interfere with the county's use of it. Instead, the plaintiff merely asserted the right to the timber on the easement and land it claimed through adverse possession.

[8] But if a municipality holds property in its proprietary capacity for a nonpublic purpose, it may be subject to an adverse possession claim. *Commercial Waterway District No. 1 of King Cy. v. Permanente Cement Co.*, 61 Wn.2d 509, 379 P.2d 178 (1963); *Sisson v. Koelle*, 10 Wn. App. 746, 520 P.2d 1380 (1974). There is no question that the alley here was forever dedicated to the City for a *public purpose*. Ex. 27.

The *Erickson* court concluded that when land is dedicated to the public for a street or road, the public only acquires an easement. *Id.* at 497.[9] Thus, the county acquired only an equitable interest in the property and the underlying fee remained in the adjacent property owners. *Id.* at 497-98. The owners of land on each side of the street owned in fee to the center of the street, subject only to the easement in the public. Division II thus approved a cause of action for adverse possession as to the property of the servient estate.

By contrast here, the trial court never determined the nature of the original grant to the City in the Power Addition Plat. It simply *assumed* the dedicated interest was an easement without any analysis whatsoever.[10]

RCW 58.08.015 provides that

> Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be

[9] While Washington courts have adhered to the principle that a street dedication in a plat ordinarily conveys only an easement to the municipality, this is by no means the universal rule. In other jurisdictions, the rule adopted by statute is that such a dedication conveys a fee simple title to the municipality. *See* Annotation, "*Validity and Construction of Regulations as to Subdivision Maps or Plats*," 11 A.L.R. 2d 524 (1950) at § 6(b). *See also, Stecklein v. City of Cascade*, 693 N.W.2d 335, 338-40 (Io. 2005) (holding the city had fee simple title to the streets that were dedicated to it for public use).

[10] There are two types of dedications: common law and statutory. 6 Judith A. Shulman, *Wash. Real Property Deskbook*, § 91.3(1) (3d Ed.) ("Deskbook"). The distinction between the two is that a statutory dedication is an express dedication that arises from a grant while a common law dedication may be express or implied and operates by way of estoppel in pais. *Id. See also, Roundtree v. Hutchinson*, 57 Wash. 414, 415, 107 P. 345 (1910) (distinguishing between the two types of dedications).

> considered, to all intents or purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

This statute requires that a court determine the grantor's intent when dedicating land; ordinarily, a quitclaim deed only conveys the interest intended by the grantor. *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 366, 494 P.2d 996 (1972). In fact, the Power Addition Plat's dedication language, unaddressed by the trial court here, is "best evidence" of the grantor's intent.[11] *Id.* at 366. Moreover, a court is not limited to those words alone and may consider lines and designations on the plat. *Id.*

Many plats contain dedication language similar to the language at issue here. This Court should consider the scope of the property interest in streets and alleys dedicated in plats to appropriately apply the policy underlying RCW 7.28.090. The better rule is not to assume invariably, as did the *Erickson* court, that a dedication of a street or alley creates an

[11] In a statutory dedication, the owner's intent to dedicate is evidenced by presentment for filing of a final plat or short plat showing the dedication on the plat. *Deskbook* at § 91.3(1). Acceptance by the public is evidenced by approval of the plat. *Id.*

easement. Instead, courts should examine the language of the plat dedication on a case-by-case basis.[12]

In this case, the plat conveyed a fee interest to the City because it "dedicated to the public for its use forever as public thoroughfares the streets and alleys *as shown on this plat.*" Ex. 27; RP II:43. (emphasis added). The duration and extent of the interest conveyed is important. Moreover, the plat map illustrates that the alley is distinct from the Graves' Lot 10 in the Power Addition. Even the survey the Graves commissioned for the lot line adjustment indicates that the alley is a distinct property. The Powers conveyed their original fee interest in the

---

[12] There are uncounted alleys and streets dedicated in plats within the boundaries of cities and towns throughout Washington that are not yet opened. These dedications are for a critical public purpose - streets and alleys. Author Alfred E. Donohue ("Donohue") offered a snapshot of just how significant unopened public street easements are in Washington:

> Throughout Washington, public easements burden a significant amount of land. They give the city or county the right to construct a street at any time, but until the city or county actually does so, the land remains unused. For example, two Seattle neighborhoods, Magnolia and Queen Anne, have numerous unopened, unused, and unimproved public street easements. These easements total more than 21,000 linear feet in these two neighborhoods alone. This amounts to more than 650,000 square feet of unopened public street easements, or nearly fifteen acres of land in two of Seattle's most expensive neighborhoods.

Unopened Public Street Easements in Washington; Whose Right to Use that Land Is It Anyway? 76 Wash. L. Rev. 541, 541-42 (2001). Donohue also stated that "there are substantial dedicated but unopened and unused streets statewide." *Id.* at n.5. Thus, a case-by-case analysis is a better approach to examining the scope of the interest created in the plat dedication.

alley to the City when they created the addition and the interest they conveyed is different.

Thus, the trial court's decision misapplies *Erickson* to the facts of this case. A road easement was specifically dedicated in *Erickson*. The Powers' intentions at the time of the dedication here were different. They intended to dedicate a fee interest in the alley to the City. The Kielys could not claim by adverse possession against the City's alley, a fee interest. RCW 7.28.090.

In addition, the trial court erred in concluding that adverse possession applied to the *entirety* of the alley. Even if the trial court correctly concluded that the only interest the City possessed was an alley easement, adverse possession was legally precluded as to that interest under RCW 7.28.090. The ten year period for adverse possession under RCW 4.16.020 did not begin to run as to that alleged easement interest until the interest was vacated by operation of law. *Wells v. Miller*, 42 Wn. App. 94, 97, 708 P.2d 1223 (1985). The City's interest remained intact until the alley was vacated because the alley lies entirely within the boundary of a city. RCW 36.87.090,[13] providing for the automatic

[13] RCW 36.87.090 states:

> Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority for building it

vacation of a platted street or alley if not opened within five years, does not apply. *Howell v. King County*, 16 Wn.2d 557, 558, 134 P.2d 80 (1943); *Leonard v. Pierce County*, 116 Wn. App. 60, 64, 65 P.3d 28 (2003) (". . . the non-user statute "vacates" *any county road* not opened for public use within years of the order or authority for opening it. But the statute's proviso exempts streets dedicated in a plat from such a non-user vacation.") (emphasis added). The statutory period for adverse possession commenced when the City vacated the alley. The Graves thus remain in possession, at a minimum, of the alley easement.

This argument is further reinforced by the fact that the Graves and their predecessors-in-interest held only a reversionary interest (or a possibility of reverter) in the alley if the City held only an easement. Had the City not vacated the alley, the Graves would have no interest to dispossess by adverse possession. An adverse possession claim cannot be asserted against a reversionary interest or a remainder interest until the future interest becomes a vested interest. *Martin v. Walters*, 5 Wn. App. 602, 490 P.2d 138 (1971); *Northwestern Indus., Inc. v. City of Seattle*, 33 Wn. App. 757, 760, 658 P.2d 24, 27 (1983). Holders of a future interest,

---

barred by lapse of time: PROVIDED, That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed to deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places.

including those who have only a remainder or reversionary interest, cannot be dispossessed by the record owner's failure to take action to prevent adverse possession. *See Martin*, 5 Wn. App. at 604 (citing *Mielke v. Miller*, 100 Wash. 119, 124, 170 P. 143 (1918)). The record owner in this case for the 97 years immediately preceding the vacation was the City, through a dedication in the Power Addition Plat.

(4) The Kielys Failed to Establish the Necessary Elements of Adverse Possession

The trial court erred in concluding the Kielys were entitled to the entire alley by adverse possession. They failed to establish the necessary elements of adverse possession as to the alley and the servient estate.

(a) The Kielys' use was convenient and incidental to the proximity of the alley

In an adverse possession case, the property must be used beyond the use it would receive merely because it was handy and convenient; it must be utilized and exploited as by an owner answerable to no one. *Hunt, supra* at 238 (citing *Fadden v. Purvis*, 77 Wn.2d 23, 459 P.2d 385 (1969)); *Butler v. Anderson*, 71 Wn.2d 60, 426 P.2d 467 (1967); *Mesher v. Connolly*, 63 Wn.2d 552, 388 P.2d 144 (1964). Here, the Kielys did not erect a fence to exclude the public from accessing the alley or maintain the so-called "hog wire fence." CP 51; RP I:152. The Kielys and their predecessors allege that from time to time a hobby garden crept across the

alley. But the public accessed the alley, including parts of the disputed area, to drive and park cars, walk their dogs, visit the local library, and ride dirt bikes. The public generally used the alley as a *convenient* public space. All of these uses are uses of convenience, not ownership.

(b) The Kielys' use, and that of their predecessors, was not exclusive

"Use alone does not necessarily constitute possession. The ultimate test is the exercise of dominion and control over the land in a manner consistent with actions a true owner would take." *ITT Rayonier, Inc.* at 760. Shared occupancy of the disputed property precludes a finding of exclusivity for purposes of adverse possession. *See Crites v. Koch*, 49 Wn. App. 171, 741 P.2d 1005 (1987). As identified above, the general public has enjoyed continuous and unfettered access to the alley, without objection or obstruction by the Kielys. *See ITT Rayonier, supra.*

(c) Neither the Kielys nor their predecessors made any attempt to assert dominion and control over the alley

The mere existence of a fence does not establish dominion and control. A fence existing as a convenience rather than as an assertion of ownership does not establish notice of a claim. *Taylor v. Talmadge*, 45 Wn.2d 144, 273 P.2d 506 (1954), *overruled on other grounds in Chaplin*, 100 Wn.2d at 862. A fence that is not erected or improved by the claimant

and is allowed to deteriorate, exists "as a convenience rather than an assertion of ownership," and one that does not exclude others from the property "does not indicate an affirmative exertion of dominion" and control over the property. *See Hunt*, 8 Wn. App. at 238, (citing *Beck v. Loveland*, 37 Wn.2d 249, 222 P.2d 1066 (1950)); *Taylor*, 45 Wn.2d at 149.

In *Muench v. Oxley*, 90 Wn.2d 637, 642, 583 P.2d 939 (1978), this Court examined facts similar to this case. There, a purchaser of land next to an unimproved tract began using part of the land. Not having used the land for ten years, he attempted to tack his use onto that of his predecessors-in-interest. Like this case, the would-be adverse-possessor asserted that the existence of an old dilapidated fence was a clear line of occupation. The *Muench* court held that when Oxley had taken possession, the "fence itself was in a dilapidated condition and the ground on either side was heavily covered by trees and underbrush" and offered no proof that Oxley was in actual possession. *Id.* at 642.

Here, neither the Kielys nor their predecessors built or maintained the "hog wire fence." In fact, Sally Chapin-Kiely admits that she had to spray the hog wire fence with white paint when she was taking photos of it because it was not visible otherwise. *See, e.g.*, RP I:112-13, 115. An unbiased observer would quickly note that the fence actually defines the

northern boundary of Lot 10 and that its welded-wire fabric is affixed to the outboard side of the posts, lending to the conclusion that it was constructed by the owner of Lot 10, not by the Kielys' predecessors. CP 51-52. From this small detail, it is reasonable to assume that a previous owner of Lot 10 built the fence to keep the public from wandering off of the public alley onto Lot 10.

Moreover, William Kiely testified that he surrendered a portion of the alley to "Mother Nature" and never went near it. RPI:165. Testimony from Ken Graves' brother Robert Graves, confirms that the Kielys never asserted dominion and control over this portion of the alley. RPI:210-11, 214, 223, 226. The alley was impassible in this area because of the brambles and blackberry bushes. *See id.*

(d) Gaps in periods of possession break the chain for the purposes of tacking

There are significant gaps in the Kielys' timeline. Even if they were to contend that seasonal or sporadic use was sufficient, continuous use means use that is consistent with the kind and character of use a true owner would put the property in question. *ITT Rayonier,* 112 Wn.2d at 759. A clear break in possession stops the time period and the adverse possession is abandoned. 17 William B. Stoebuck and John W. Weaver, *Wash. Practice Series, Real Estate: Property Law,* § 8.17. Moreover, a

break in a period of possession cannot be added to the following time period. *See id.* Continuous means continuous. The Kielys took possession in 2000.

(e) The Kielys' use was not open and notorious

"The acts constituting the warning which establishes notice must be made with sufficient obtrusiveness to be unmistakable to an adversary, not carried out with such silent civility that no one will pay attention. The intention to claim title to an area must be objectively exhibited by the claimant." *Hunt*, 8 Wn. App. at 236 (citation omitted). Again, neither the Kielys nor their predecessors constructed a fence to define the alley as part of their property. The public was not excluded from the alley. The Kielys' use, and that of their predecessors, was incidental to the public alley's character and proximity. The Kielys both testified *they never used the back third of the alley* and that they never maintained it. RPI:161, 165. Sally also testified it was impassable. RPI:150. Importantly, she did nothing to maintain the original gardens planted in that area and let them go fallow. RPI:161.

(f) The hog wire fence is not evidence of "actual use"

Actual use is a fact dependent inquiry. Courts have found the element of actual use present where a user built a fence enclosing an area and cultivated the property up to that fence line, *Kent v. Holderman*, 140

Wash. 353, 248 Pac. 882 (1920), and where the user mowed a lawn up to the fence line and maintained a flower bed and compost pile on the property. *See Krona v. Brett*, 72 Wn.2d 535, 433 P.2d 858 (1962)). But here, the Kielys did not build the "hog wire fence" or maintain it. In *White v. Bronchick*, 160 Wash. 697, 295 P. 292 (1931), this Court held that construction of a crooked, temporary fence and some cultivation up to it is not actual possession. Neither the Kielys nor their predecessors built any fence to enclose the alley as part of their property.

(g) The use of the alley by the Kielys' predecessors was not exclusive

Periodic, sporadic, or incidental use is not exclusive use. In *Petticrew v. Greenshields*, 61 Wash. 614, 621, 112 P. 749 (1911), this Court held that periodic cutting of firewood for domestic use and occasional picnicking did not indicate possession. Likewise, the intermittent use of a disputed area for hobby gardens and public parking lacks the continuity or consistency necessary to establish actual use of the disputed area. *See Kent, supra.*

In fact, half of the alley at issue here was open to the public throughout its 97-year existence prior to vacation. Washington law requires that "[i]n order to be exclusive for purposes of adverse possession, . . . the possession must be of a type that would be expected of

an owner under the circumstances." *See Crites v. Koch*, 49 Wn. App. 171, 174, 741 P.2d 1005 (1987) (citing *Russell v. Gullett*, 285 Or. 63, 589 P.2d 729, 730-31 (1979)).

Neighbors used the alley to walk their dogs and access the city library. So did the Kielys. The alley was never fenced, access was never restricted, there were no "No Trespassing" signs placed in the alley by the Kielys or their predecessors, and the Graves used the alley publicly to access Lot 10. The only barriers and impediments to access over the alley have been created by Mother Nature in the form of large overgrown blackberry bushes, trees, shrubs, and other brambles. The Kielys and their predecessors made no attempt to exclude any member of the public from access to the alley.

(h) The use of the alley by the Kielys' predecessors was permissive rather than hostile

Permissive use cannot be hostile use. Any action recognizing explicitly or implicitly the superior title of another negates a claim of hostile use. Carol Cahill, one of the Kielys' predecessors, testified that she knew the City owned the alley. RPI:56. The Kielys themselves acknowledged the City's superior title to the alley when they applied for a parking permit for the cottage in 2001. The City granted the permit, noting the cottage occupant parked in the "Alley." Thus, all parking was

permissive in nature and not adverse. *See Jackson v. Pennington*, 11 Wn. App. 638, 647-48, 525 P.2d 822 (1974) (an application to the City of Seattle for the use of an unimproved city street was tantamount to an acknowledgement of the city's superior title in the street; and such act was a voluntary acquiescence even though the city required the application). The Kielys similarly acknowledged the Graves' superior title to the alley when they offered to purchase it from the Graves prior to filing their lawsuit.

F. CONCLUSION

If allowed to stand, the trial court's decision will result in the potential loss by municipalities of dedicated streets and alleys to claims of adverse possession by neighboring property owners that are neither foreseeable nor obvious. Moreover, property owners abutting the dedications, believing that adverse possession does not affect the servient estates subject to the dedicated interest because of the clear language of RCW 7.28.090, could face unsuspected claims of adverse possession. The result will have serious repercussions for virtually every city and town in Washington.

Here, the trial court erred in assuming that the Powers dedicated only an easement interest to the City. The dedication was actually of a fee interest, barring a claim for adverse possession under RCW 7.28.090.

Even if adverse possession were possible, clearly RCW 7.28.090 foreclosed adverse possession of the easement the trial court assumed was created. Finally, the Kielys did not establish the elements of adverse possession here.

This Court should reverse and vacate the trial court's judgment and decree. In the alternative, the Court should reverse the judgment and decree and remand the case to the trial court with directions to narrow the scope of the Kielys' interest in the alley. Costs on appeal should be awarded to the Graves.

DATED this 16th day of November, 2010.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Frederick Mendoza, WSBA #6021
Maya R. Mendoza-Exstrom, WSBA #39333
Mendoza Law Center, PLLC
PO Box 66890
Burien, WA 98166-0890
(206) 244-1641
Attorney for Appellants Graves

APPENDIX

West's Revised Code of Washington Annotated Currentness
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.28. Ejectment, Quieting Title (Refs & Annos)

7.28.090. Adverse possession--Public lands--Adverse title in infants, etc.

RCW 7.28.070 and 7.28.080 shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is a person under eighteen years of age, or incompetent within the meaning of RCW 11.88.010: PROVIDED, Such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land.

CREDIT(S)

[1977 ex.s. c 80 § 7; 1971 ex.s. c 292 § 7; 1893 c 11 § 5; RRS § 790.]

HISTORICAL AND STATUTORY NOTES

Purpose--Intent--Severability--1977 ex.s. c 80: See notes following RCW 4.16.190.

Severability--1971 ex.s. c 292: See note following RCW 26.28.010.

Laws 1971, Ex.Sess., ch. 292, § 7, in the second sentence, substituted "a person under eighteen years of age" for "an infant or person under legal age".

Laws 1977, Ex.Sess., ch. 80, § 7, in the second sentence, substituted "or incompetent within the meaning of RCW 11.88.010" for "or insane".

Source:

RRS § 790.

LAW REVIEW AND JOURNAL COMMENTARIES

Infants' contracts and their enforcement. 35 Wash.L.Rev. 465 (1960).

Law of adverse possession in Washington. 35 Wash.L.Rev. 53 (1960).

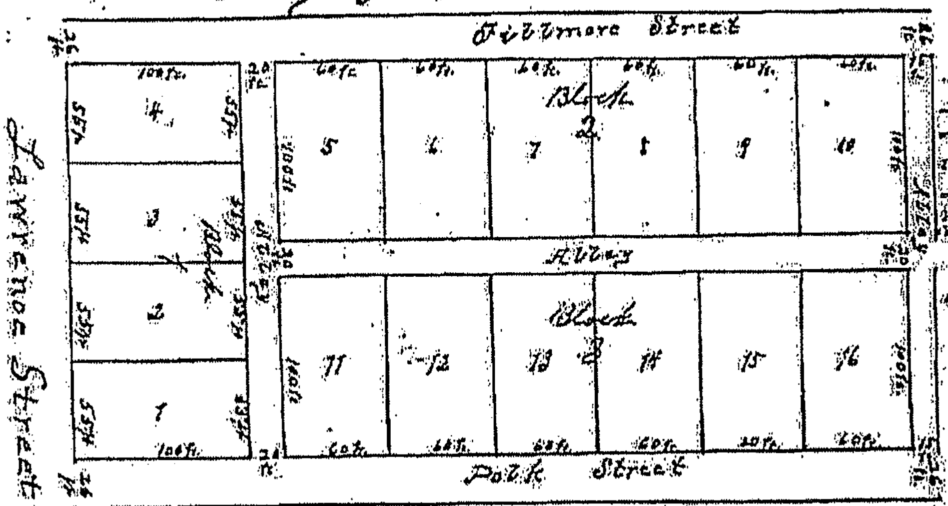
Tolling of adverse possession statutes. 35 Wash.L.Rev. 65 (1960).

2-120

Plat of POWER Addition

To the City of Port Townsend, Washington

File No.



John M. Power
18th March
1908 10 a
2 120
Plat
[illegible]

This Plat of Power addition to the City of Port Townsend, Washington is located and described as follows: Commencing at a point 20 feet East of the Westerly Line of Polk Street on the Northerly boundary of Lawrence Street, Thence in a Northerly direction 495 feet, Thence Westerly 272 feet, Thence Southerly 495 feet, Thence Easterly 272 feet to the place of beginning.

The length of the sides of the blocks and lots and width of the streets and alleys are as indicated in this plat.

State of Washington } SS
County of Jefferson }

Know all men by these presents that we, John M. Power & Mary E. Power of the City of Port Townsend and County and State aforesaid do hereby lay off into blocks, lots, streets & alleys the certain tract of land shown in this plat and of which a description is hereunto annexed said plat to be known as Power addition to the City of Port Townsend, Washington.

And we do hereby dedicate to the public for its use forever as public thoroughfares the streets and alleys as shown in this plat.

Witness our hands and seals this day the 20th of A. D. 1908.

Signed & sealed in the presence of
J. A. Kuhn
Jerry L. Myers

John M. Power (Seal)
Mary E. Power (Seal)

Approved March 1908
[illegible]
Mayor of Port Townsend

Attest
George Anderson
City Clerk

State of Washington } SS
County of Jefferson }

This is to certify that on this 20th day of 1908 personally appeared before me, the undersigned, a notary public in and for said County and State, John M. Power & Mary E. Power, husband and wife, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

J. A. Kuhn
Notary Public in and for the State of Washington, residing at Port Townsend

SUPERIOR COURT OF WASHINGTON
COUNTY OF JEFFERSON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY, husband and wife, Plaintiffs, vs. KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the Graves Family Trust; and all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein, Defendants.	NO. 09-2-00230-3 MEMORANDUM OPINION AND ORDER RE SUMMARY JUDGMENT

On February 16, 2010 the Plaintiffs filed a Motion for Summary Judgment on their claim for adverse possession. The Defendants responded alleging material issues of fact. The Defendants also cross motioned for summary judgment. The motions were argued before the Court on March 19, 2010. Since the Defendants motion is primarily legal in nature and could be dispositive, the Court will first address the merits thereof.

The property in question was dedicated to the City of Port Townsend as an alleyway in the original plat of 1908. It was vacated and sold to the Defendants by the city in 2009. The Defendant argues that because of the city's interest in the dedicated alleyway the Plaintiff and their predecessors in interest were legally precluded from asserting a claim of adverse possession until the 2009 vacation, i.e. that the ten year statute for adverse possession could not begin to run until 2009.

GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

The Court has reviewed the cases cited by the parties on this issue and finds the Division II case of Erickson Bushling v. Manke Lumber Company, 77 Wn. App. 495 (1995) to be dispositive. The substantive facts before the Court and the legal issue addressed in that case are identical to those in the present cause.

In Erickson Bushling the parties were adjacent property owners. When the land was originally platted, a 60-foot wide easement for a county road between the two properties was dedicated. The road was never opened, nor was it ever vacated. In the 1950's Erickson's predecessor built a barbed wire fence along what he believed was the center of the roadway. In 1990 a survey was conducted by Manke which showed the fence encroaching more than 30 feet onto the Manke property. Manke then logged the property up to the survey line, crossing the existing fence line.

The facts of the present case are quite similar. The properties in question lie adjacent, separated by a dedicated, but unopened alley. An old fence line is alleged to have separated the Plaintiffs property from that of the Defendants, with the unopened alley having been used for years by the Plaintiffs and their predecessors up to said fence. As in Erickson Bushling, the Defendants assert that because the alley in dispute was part of a dedicated, unopened right-of-way to the city the claim for adverse possession could not accrue until its vacation in 2009. In Erickson Bushling the Plaintiff asked the Court to determine "whether the action could be maintained in light of the County's easement and the law that adverse possession generally cannot run against property held for any public purpose. (page 497).

GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

Division II ruled that "when land is dedicated to the public for a street or road, the public acquires only an easement", i.e. an equitable interest in the property for a "public right of passage". (page 497-8). Consequently, the "underlying fee remains in the adjacent property owners" (page 498) thus allowing an action for adverse possession to be pursued against the fee owner.

> "We hold that where, as here, the dedicated road in question is unopened, title to the disputed property is held by a private party, and neither access to the right-of-way nor any interest of the public is at issue, an action for adverse possession of the underlying fee may be maintained against the fee owner." (page 499).

In the present case the Defendants and their predecessors were "fee owners" of the alley in question. The city's interest was equitable only and according to the Court in Erickson Bushling would not foreclose a claim for adverse possession by the adjoining land owner. In fact in Erickson Bushling the county's interest in the roadway had not been vacated and continued to exist during the proceeding for adverse possession. The Defendants argument, therefore, that the ten year statute started to run only after the city's vacation of the alley has no merit based upon that ruling. Consequently, the present action may proceed.

With regard to the Plaintiffs Motion for Summary Judgment the Court finds that there are material issues of fact. The mere presence of a fence does not automatically result in a finding of adverse possession. The doctrine has numerous elements and must be proved by clear, cogent and convincing evidence. The facts asserted by the

GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

Defendants are material and contrary to the Plaintiffs claim. Summary judgment is not appropriate.

ORDER

Based upon the aforesaid Memorandum Opinion and the Court's review of the memoranda and declarations filed by the parties hereto the Court finds that there are material issues of fact and that neither party is entitled to judgment as a matter of law. Therefore, it is hereby,

ORDERED that the Plaintiffs Motion for Summary Judgment is hereby denied.

IT IS FURTHER ORDERED that the Defendants Motion for Summary Judgment is hereby denied.

DATED this 26th day of March, 2010.

GEORGE L. WOOD
JUDGE

GEORGE L. WOOD
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

FILED

10 JUL -2 PM 2:04

JEFFERSON COUNTY
RUTH GORDON, CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY, Husband and Wife, Plaintiffs, -vs- KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the Graves Family Trust and any persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein; Defendants.	NO. 09-2-00230-3 FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter coming on for trial on April 5 and 6, 2010, plaintiffs William H. Kiely and Sally Chapin-Kiely appeared through their attorney, Richard L. Shaneyfelt, and defendants Kenneth W. Graves and Karen Graves, as trustees of the Graves Family Trust appeared through their attorneys, Frederick Mendoza and Maya Mendoza-Exstrom, of the Mendoza Law Center, PLLC, and the court, having considered the file in this matter and the testimony of Susan Ambrosius, Carol Cahill, Daniel Blood, Sally Chapin-Kiely, Toby Sheffel, William Kiely, Kenneth Graves, Robert Graves, Karen Graves, Suzanne Wassmer, Dominic Smith, and Vivian Chapin, as well as the arguments of counsel; the court having also considered the admitted exhibits and, with the permission of the parties and not in their presence, having viewed the property on April 6, 2010, and now being fully advised by argument of legal counsel; and having rendered a Memorandum Opinion after trial dated May

ORIGINAL

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

18, 2010, filed herein, makes the following:

FINDINGS OF FACT

1. Plaintiffs, William H. Kiely and Sally Chapin-Kiely, are husband and wife, form a marital community under the laws of State of Washington, and reside in Jefferson County, Washington. Plaintiff s are the owners of the West 84 feet of Block 7, all of Block 9, and the East 37 feet of Block 11, F.H. Winslows Addition to the City of Port Townsend, as per Plat recorded in Volume 1 of Plats, Page 12, records of Jefferson County, Washington.

2. Defendants, Kenneth W. Graves and Karen R. Graves, are Trustees of the Graves Family Trust, reside in King County, Washington, but own Lot 10, Block 2 of the Power Addition to the City of Port Townsend as per Plat recorded in Volume 2 of Plats, Page 120, Jefferson County, Washington, together with the vacated alley contiguous thereto.

3. Said alley was platted wholly within the Power Addition, lies between the parties' two parcels (Exhibit 27) and is depicted as "vacated alley" on Exhibit 1, the Anderson survey. The ~~area of Lot 10 and the~~ vacated alley ~~northerly of the hog wire fence~~ is the disputed area between the parties and is legally described in Exhibit "A" attached hereto.

4. No person remembers the alley ever being opened or used as a public right-of-way nor is there any record of it having been opened presented in court, and thus, the court finds that the alley was never opened or used by the public as an alley.

5. The alley was formally vacated by the City of Port Townsend by ordinance on February 17, 2009. (Exhibit 28).

6. Plaintiffs claim title to the disputed area by adverse possession. Defendants claim title to the disputed area through their deed and as a result of the vacation proceeding and payment to the City of Port Townsend as shown by Exhibit 28.

7. There is a hog wire fence, which runs along the southerly boundary of the disputed area. That fence has been in existence as long as the parties or witnesses can remember. Kenneth Graves testified that it has been there since he was a kid. Exhibits 12 through 18 are current pictures of the fence.

8. There is a shed and cottage on Plaintiffs' property as shown in Exhibit 1 and pictured in Exhibit

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

2.

9. The cottage actually encroaches into the alley as depicted in Exhibit 1. The easterly approximately one-fourth of the disputed area is used and historically has been used as a parking area for the cottage and shed.

10. Daniel Blood testified that he owned Plaintiff's property (1123 Garfield) from 1981 until 1987. He used the disputed area to store building materials. He had a trailer parked in the disputed area to support his masonry and tile contracting business and used the disputed area as he wanted to use it, for his business. During his ownership, Lot 10 remained unused. Mr. Sheffel also recalls Mr. Blood's use of the disputed area for his business and remembers the hog wire fence as the boundary between 1123 Garfield and Lot 10.

11. In 1993 Carol Cahill moved onto the property. At that time, Duncan Watters lived there as well and had developed an extensive artistic garden in the disputed area. Mr. Watters used the hog wire fence to support his fava beans and other plants while he resided there.

12. It is clear from the testimony of Ms. Cahill and Ms. Ambrosius that during the time Mr. Watters lived on the property he made exclusive use of the disputed area for his impressive garden. He also used the cottage for his bakery business (Exhibit 31) and customers of that business would park in the eastern end of the disputed area next to the cottage and shed. Exhibit 2 provides detail regarding Mr. Watters' garden, which is supported by the testimony. It is clear that from at least 1993 through 2000, Mr. Watters cultivated and used the disputed area in connection with his occupancy of 1123 Garfield and treated the disputed area as his property. Mr. Watters left the property when Plaintiffs purchased the property in 2000.

13. From 2000, until this litigation commenced Mr. Kiely mowed and "weed wacked" the disputed area. (Testimony of Vivian Chapin). Plaintiffs are not gardeners and did not continue to use the area as a garden; however, Plaintiffs did maintain most of the disputed area up to the hog wire fence except the portion of the west, which he allowed to become overgrown with blackberries.

From the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter of this action.

2. In proceedings prior to trial Defendants moved for summary judgment asserting that

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

Plaintiffs could not prevail in an adverse possession action as the property involved was a dedicated alley which had not been vacated.

3. Judge Wood issued his Memorandum Opinion and Order, filed March 29, 2010 [CP 38], in which he found *Erickson Bushling v. Makne Lumber Co.*, 77 Wn. App. 495, 891 P.2d 750 (Div. II, 1995) to be dispositive. Judge Wood held that the alley, while dedicated, was unopened. Thus, following the holding in *Erickson*, while the City had an easement for a "public right of passage", an adverse possession claim could lie against the fee ownership which is vested in adjoining landowners.

4. Defendants argued that Judge Wood was wrong, asserting that *Erickson* relied on the statute which automatically vacated a dedicated road if it is unopened for five years after its dedication. Defendants are correct asserting that the statute does not apply to streets dedicated for public rights of way within an incorporated city. However, the *Erickson* Court did not rely on the statute in its analysis that adjoining landowners each own the fee interest in the right of way which is subject to adverse possession. The remaining cases cited by defendants in closing argument, *Brokaw v. Town of Stanwood*, 79 Wash. 322, 140 Pac. 358 (1914), *Miller v. King County*, 59 Wn. 2d 601, 36 P.2d 304 (1962), *Martin v. Walters*, 5 Wn. App. 602, 490 P.2d 138 (Div. II, 1971) and *Hunt v. Matthews*, 8 Wn. App. 233, 505 P.2d 819 (Div. I, 1973) are distinguishable.

5. This court will not reconsider Judge Wood's ruling on summary judgment, which allowed the case to proceed to trial.

6. Plaintiffs William H. Kiely and Sally Chapin-Kiely should have title quieted in their names to the disputed area as shown on Exhibit 1~~, bordered by the hog wire fence to the south~~.

7. Plaintiffs and their predecessors in interest have made exclusive, actual and uninterrupted, open and notorious and hostile use of the disputed area under a claim of right made in good faith for a period exceeding ten years from the filing of their complaint herein. Plaintiffs and their predecessors made use of the property as set forth in the findings of fact above that would have put Defendants on notice for more than ten years that a claim was being made to ownership of the disputed area up to the hog wire fence and its extension to the east.

8. The evidence supports Plaintiffs' claim that during at least the ten years prior to the filing of Plaintiffs' complaint, the Defendants made no use of the disputed area.

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

9. Defendants had actual notice of the Plaintiffs' and their predecessors' use of the disputed area.

10. Plaintiffs' and their predecessors use of the disputed area was continuous for more than ten years prior to the filing of the complaint herein.

11. Defendants' vacation of the City's easement interest in the alley did not affect Plaintiffs' underlying adverse possession claim to the servient estate.

DONE IN OPEN COURT this 12 day of July, 2010.

CRADDOCK D. VERSER
JUDGE

CRADDOCK D. VERSER, JUDGE

Presented by:

Richard L. Shaneyfelt, WSBA #2969
Attorney for Plaintiff

Approved for Entry, Notice
Of Presentation Waived, Copy Received:

MENDOZA LAW CENTER, PLLC

By:
Frederick Mendoza, WSBA #6021
Attorney for Defendants

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

FILED

10 JUL -2 PM 2:04

JEFFERSON COUNTY
RUTH GORDON [illegible]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF JEFFERSON

WILLIAM H. KIELY and SALLY CHAPIN-KIELY, Husband and Wife, Plaintiffs, -vs- KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the Graves Family Trust and any persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein; Defendants.	NO. 09-2-00230-3 **JUDGMENT AND DECREE** **CLERK'S ACTION REQUIRED:** **ENTER PROPERTY/MONEY JUDGMENT**

I. REAL PROPERTY JUDGMENT SUMMARY

[X] Real Property Judgment Summary is set forth below:

Assessor's property tax parcel or account number:	TPN 990 000 207
Legal Description of the property awarded:	
	See Exhibit "A" for full legal description.

II. JUDGMENT SUMMARY

A. Judgment Creditor: WILLIAM H. KIELY and SALLY CHAPIN-KIELY, Husband and Wife

ORIGINAL

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

B. Judgment Debtor : KENNETH W. GRAVES and KAREN R. GRAVES, Trustees of the Graves Family Trust

C. Principal judgment amount: $ -0-

D. Interest to date of judgment: $ -0-

E. Attorney's fees $ $200.00

F. Costs $ $225.00

G. Other recovery amount $ _____

H. Principal judgment shall bear interest at 12 % per annum.

I. Attorney's fees, costs and other recovery amounts shall bear interest at 12 % per annum.

J. Attorney for judgment creditor: Richard L. Shaneyfelt
1101 Cherry St.
Port Townsend, WA 98368
(360) 385-0120

K. Attorney for judgment debtor: Frederick Mendoza
Mendoza Law Center, PLLC
PO Box 66890
Burien, WA 98166-0890

L. Other:

This matter having come before the court for trial; having heard the testimony of the parties and their witnesses; having heard the argument of counsel; after considering the evidence and having made and entered its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that fee simple title in ~~that portion of Lot 10 and~~ the vacated alley appurtenant in Power Addition to the City of Port Townsend, official records of Jefferson County, Washington, described in Exhibit "A" attached hereto and incorporated by reference is hereby quieted, established and confirmed in the name of Plaintiffs WILLIAM H. KIELY and SALLY CHAPIN-KIELY, husband and wife, as their community property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendants and all other persons or parties unknown, claiming any right, title, estate, lien or interest in or to said real estate or any portion thereof, and all persons claiming under the defendants, or any of them, be and they are hereby forever barred from

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

having or asserting any right, title, estate, lien or interest in the Property, or any part thereof, adverse to Plaintiffs.

DONE IN OPEN COURT this 2 day of July, 2010.

CRADDOCK D. VERSER
JUDGE

CRADDOCK D. VERSER, JUDGE

Presented by:

Richard L. Shaneyfelt, WSBA #2969
Attorney for Plaintiffs

Approved for Entry, Notice
Of Presentation Waived, Copy Received:

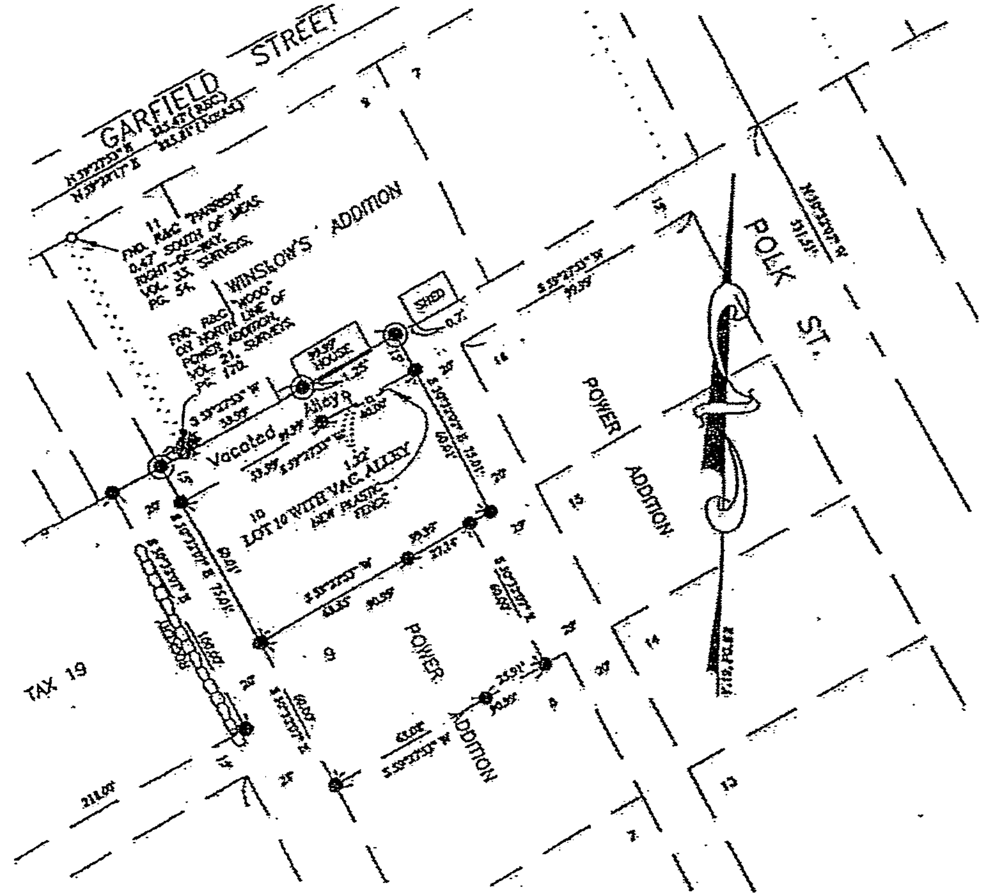
MENDOZA LAW CENTER, PLLC

By: _____
Frederick Mendoza, WSBA #6021
Attorney for Defendants

RICHARD L. SHANEYFELT
ATTORNEY AT LAW
1101 CHERRY STREET
PORT TOWNSEND, WA 98368
(360) 385-0120

BOOK 34 OF SURVEYS, PAGE(S) 132

SURVEY OF LOT LINE ADJUSTMENT
LOT 10 & CONTIGUOUS ALLEY, BLOCK 2, POWER ADDITION, SEC. 2, TWP. 30 N., RANGE 1 WEST, W. M., JEFFERSON COUNTY, WASHINGTON



LEGAL DESCRIPTIONS

REFER TO STATEMENT OF INTENT RECORDED AUG. 2, 2009 FILED UNDER AUDITOR'S FILE NO. 540927 AND ORDINANCE NO. 3005 FOR ALLEY VACATION FILED UNDER AUDITOR'S FILE NO. 540919

APPROVALS

DEVELOPMENT SERVICES DEPARTMENT APPROVAL:
DEVELOPMENT SERVICES DEPARTMENT 2/27/09 DATE
CITY OF PORT TOWNSEND

JEFFERSON COUNTY ASSESSOR APPROVAL:
JACK WESTERMAN III 3/2/09 DATE
COUNTY ASSESSOR
BY DEPUTY

SURVEYOR'S NOTES:

BASIS OF BEARING:
CONSISTANT WITH THE GEODETIC CONTROL AND MONUMENTATION PLAN FOR THE CITY OF PORT TOWNSEND, (VOL.19, SURVEYS, PG.61-70)

EQUIPMENT USED:
THIS SURVEY WAS PERFORMED USING A TOPCON GTS 301-D ELECTRONIC TOTAL STATION THEODOLITE/E.D.M. DURING CLOSED RANDOM TRAVERSES FROM AND BETWEEN EXISTING PLAT MONUMENTS.

CONTROL ACCURACY:
THIS SURVEY MEETS OR EXCEEDS STATE MINIMUM ACCURACY REQUIREMENTS OF 1:5,000 FOR "(b) CITY-RESIDENTIAL AND SUBDIVISION LOTS" PER W.A.C. 332-130-090.

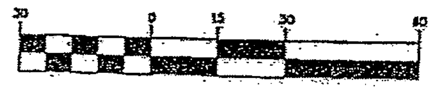
LEGEND:

- SET 1/2" REBAR & CAP, STAMPED "ANDERSON 27655".
- 1/2" REBAR & CAP, STAMPED "ANDERSON 27655" PER VOL. 34 OF SURVEYS, PAGES 128, 129 & 130.
- FOUND CONCRETE MONUMENT WITH BRASS DISC & PUNCH IN IRON CASE (11-04)

REFERENCE SURVEYS:

VOL.2 OF PLATS, PG 120 (POWER ADD.)
VOL. 1 OF PLATS, PG 17 (F.H.WINSLOW'S ADD.)
VOL. 33, SURVEYS, PG.54 (PARRISH)
VOL. 21, SURVEYS, PG. 170 (WOOD)

GRAPHIC SCALE



(IN FEET)
1 inch = 30 ft.

540950
AUDITOR'S FILE NO./RECORDING NO.

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE SURVEY RECORDING ACT AT THE REQUEST OF:
GRAVES FAMILY TRUST
DECEMBER 2008
2/23/09
MICHAEL J. ANDERSON, PE & PLS
CERTIFICATE NO. 27655

ANDERSON
CIVIL ENGINEERS
& SURVEYORS
PORT TOWNSEND, WA. 98368
(360) 385-0398

RECORD OF SURVEY
PERFORMED IN JEFFERSON CO., WA. FOR:
GRAVES FAMILY TRUST
PORT TOWNSEND, WA.

RECORDING CERTIFICATE

FILED FOR RECORD THIS 2 DAY OF March 2009
AT 11:21 A.M. IN BOOK 34 OF SURVEYS AT PAGE 132
AT THE REQUEST OF:
ANDERSON CIVIL ENGINEERS AND SURVEYORS
DEPUTY AUDITOR/MANAGER AUDITOR/SUPT. OF RECORDS

SHEET: 1 OF 1
SCALE: 1" = 30'
SURVEYED: RAR SKH
FIELD BOOK: 210
DRAWN: RAR
CHECKED: MJA
FILE: BLA ROS.dwg

INDEX GRAPH
S.E. TWN. RTDS. W.M.

DECLARATION OF SERVICE

On said day below I emailed and deposited in the US Mail a true and accurate copy of the following document: Brief of Appellant in Supreme Court Cause No. 84828-9 to the following:

Fred Mendoza
Maya R. Mendoza-Exstrom
Mendoza Law Center, PLLC
PO Box 66890
Burien, WA 98166-0890

Kenneth W. Masters
Wiggins & Masters, PLLC
241 Madison Avenue N.
Bainbridge Island, WA 98110

Original efiled with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 16, 2010, at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Christine Jones
Subject: RE: 84828-9 Graves

Rec. 11-16-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----
From: Christine Jones [mailto:christine@tal-fitzlaw.com]
Sent: Tuesday, November 16, 2010 2:49 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 84828-9 Graves

Clerk:

Attached for today's filing in case number 84828-9 is Brief of Appellants attached. Kiely v. Graves.

Thank you -

Christine Jones
Office Manager
Talmadge/Fitzpatrick
(206) 574-6661